Kajima Engineering and Construction, Inc. *and* Internatiol Union of Operating Engineers, Local 12, AFL–CIO–CLC. Cases 28–CA–14029 and 28–CA–14076

August 31, 2000

DECISION AND ORDER
BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On January 29, 1998, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions, supporting briefs, and answering briefs. The Respondent and the Charging Party also filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The General Counsel and the Charging Party except to the judge's failure to find that the layoff of employee Todd Ewoldt violated Section 8(a)(3) and (1) of the Act. The judge concluded that the General Counsel had not met its burden of establishing that Ewoldt's union activities were a motivating factor in the Respondent's action against him because there was no evidence showing that the Respondent had knowledge of Ewoldt's union activities. He therefore recommended that this complaint allegation be dismissed.

The General Counsel contends that the Board should infer from all of the circumstances, including evidence of the Respondent's demonstrated union animus as reflected in the numerous 8(a)(1) violations found by the judge, and the timing of the layoff, not only that the Respondent knew of Ewoldt's protected union activities or sympathies, but that this knowledge was the true motive behind the Respondent's selection of Ewoldt for layoff. The Charging Party also argues that the judge committed reversible error by his exclusion of relevant testimony from Ewoldt regarding his conversations with the Respondent's superintendent, Bruce Kellogg, about the Union and Ewoldt's union sympathies or activities. The Respondent, in opposing the General Counsel's and the Charging Party's exceptions, contends that the judge was correct in his dismissal of the 8(a)(3) and (1) allegation because Ewoldt was laid off due to lack of work. For the following reasons, we find merit in the General Counsel and the Charging Party's exceptions.

It is well established that where there is no direct evidence, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. *BMD Sportswear Corp.*, 283 NLRB 142 (1987), enfd. 847 F.2d 835 (2d Cir. 1988); and *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Such circumstances may include the employer's demonstrated knowledge of general union activity, the employer's demonstrated union animus, the timing of the discharge in relation to the employee's protected activities, and the pretextual reasons for the discharge asserted by the employer. *Greco & Haines, Inc.*, 306 NLRB 634 (1992); and *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979).

Applying the above criteria here, we find, contrary to the judge, compelling circumstantial evidence that warrants an inference that the Respondent knew of or at least suspected Ewoldt of engaging in union activities or harboring union sympathies and that it terminated him because of those activities in violation of Section 8(a)(3) and (1).[3] The evidence reveals that the Respondent harbored animus against the Union as demonstrated in the judge's findings of numerous 8(a)(1) violations. Specifically, the Respondent unlawfully interrogated employees, including Ewoldt, in an attempt to ascertain how they were going to vote in the October representation election. In addition, the Respondent threatened the employees with plant closure and job loss if they chose the Union as their bargaining representative, promised employees increased wages and benefits if they rejected the Union, and threatened not to negotiate in good faith with the Union. Further, the Respondent discharged employees Robert Atteberry and Robert Rupp in violation of Section 8(a)(3) and laid-off employees Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor in violation of Section 8(a)(5).

We also find that the alleged reason proffered by the Respondent for Ewoldt's layoff does not withstand scrutiny. Ewoldt was one of the Respondent's most senior employees on its Del Webb project, having been hired in August 1995. He was a 637D scraper operator and possessed the ability to operate the Respondent's other heavy equipment, including blades, bulldozers, water pulls, and loaders. On December 9, 1996,[4] the Respon-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc*., 325 NLRB 17 (1997).

[3] We agree with the Charging Party's contention that the judge erred in excluding testimony regarding conversations between Ewoldt and Superintendent Kellogg, which could have established direct evidence of the Respondent's knowledge of Ewoldt's union sympathies. However, in view of our conclusion that the General Counsel has otherwise established a showing of such knowledge, we find that a remand to the judge for a reopening of the record is not necessary.

[4] All dates are in 1996 unless otherwise indicated.

dent's superintendent, Bill Matovich, told Ewoldt that he was being laid off "as our job was winding down and we were out of scraper work." As the judge noted, however, the Respondent's past practice when a job was winding down was to transfer the employee to another jobsite and that layoffs seldom, if ever, occurred. Further, the judge credited Ewoldt's testimony that he was the most senior employee at the Del Webb building site, and that employees with lesser seniority and experience, some of whom were trained by Ewoldt, were retained by the Respondent. Regarding the Respondent's claim that the work was winding down, the judge found that during the week prior to Ewoldt's layoff, the Respondent operated two 637D scrapers each day; and that from the date of Ewoldt's layoff (December 9) through January 6, 1997, the Respondent continued to operate two 637D scrapers almost every day with lesser experienced employees than Ewoldt.

Moreover, Matovich's testimony establishes that the Respondent had other ongoing projects that continued through January 1997 and required the operation of scraper machines. Thus, it is clear that the Respondent had scraper work at the Del Webb site and at other projects that Ewoldt could have performed.

We note, further, that the Respondent gave shifting reasons for Ewoldt's selection for layoff. Matovich testified that the only reason Ewoldt was selected was that the job was winding down. Subsequently, the Respondent's project manager, John Prlina, belatedly asserted that Ewoldt was selected for layoff because of excessive absenteeism. However, as the judge found, not only did the Respondent fail to put into evidence any of Ewoldt's attendance records, but also Prlina admitted that he had only reviewed Ewoldt's records the day before he testified. Under these circumstances, we find that the Respondent's shifting reasons for selecting and laying off Ewoldt were pretextual in nature and that, given the evidence of union animus, we are warranted in inferring an improper motive for Ewoldt's layoff. *Whitesville Mill Service Co*., 307 NLRB 937 (1992).

In making this finding, we rely on the fact that Ewoldt's layoff occurred soon after the Union was certified as the employees' bargaining representative, and that it occurred in the context of other discriminatory discharges. Specifically, the Union won the election held on October 24, and 1 day later the Respondent unlawfully discharged employees Robert Rupp and Robert Atteberry. On November 4, the Union was certified as the collective-bargaining representative, and on December 6 the Respondent laid off Ewoldt.

In sum, under the "confluence of circumstances"[5] in this case, including the fact that the Respondent responded to the Union's organizing campaign and certification with demonstrated unlawful threats, promises, and that the Respondent's asserted reasons for Ewoldt's layoff were pretextual, we find a sufficient basis to infer knowledge of Ewoldt's union activity or sympathy on the part of the Respondent. Therefore, we conclude that the General Counsel established that Ewoldt's union activities were a motivating factor in the Respondent's decision to lay him off. We further find, in the absence of any legitimate basis for Ewoldt's layoff, that the Respondent has not met its burden of demonstrating that the layoff would have occurred even in the absence of Ewoldt's protected conduct. Accordingly, we find that Ewoldt's layoff violated Section 8(a)(3) and (1) of the Act. *BMD Sportswear Corp*., supra.

[5] *Abbey's Transportation Services*, 284 NLRB 698 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Kajima Engineering and Construction, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union sympathies and the union sympathies of their fellow employees.

(b) Threatening its employees with closure of its Las Vegas operations if they select the Union as their bargaining agent.

(c) Threatening its employees with loss of their jobs if they select the Union as their bargaining representative.

(d) Threatening its employees that it would be less competitive, resulting in probable cutbacks and layoffs, in the residential construction market if they select the Union as their bargaining representative.

(e) Informing its employees that it would drag its heels and prolong negotiations forever and that it was, by law, only required to bargain with the Union once a month for an hour, thereby threatening its employees with the futility of selecting the Union as their bargaining representative.

(f) Promising its employees a wage increase and fully paid medical and dental insurance if they voted against the Union as their bargaining representative.

(g) Discharging its employees because it believes they have proponents of the Union amongst its employees and by discharging other employees in order to disguise its actual reason for discharging the employees whom, it believes, are leading union proponents.

(h) Laying off its employees for lack of work without giving prior notice of each layoff to the Union and, prior to each layoff, affording the Union an opportunity to bargain regarding the decision and the effects of the layoff.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Atteberry, Robert Rupp, Todd Ewoldt, Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Rupp, Todd Ewoldt, Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges and layoffs, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges/layoffs will not be used against them in any way.

(d) On request, bargain with the Union in good faith about the decisions to lay off employees Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor and about the effects of the layoffs.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under terms of this Order.

(f) Within 14 days after service by the Region, post at its office in Las Vegas, Nevada copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges that Respondent terminated its employee, Todd Ewoldt, in violation of Section 8(a)(1) and (3) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees as to their union sympathies and the union sympathies of their fellow employees.

WE WILL NOT threaten our employees with closure of our Las Vegas operations if they select International Union of Operating Engineers, Local 12, AFL–CIO as their bargaining representative.

WE WILL NOT threaten our employees with loss of their jobs if they select the Union as their bargaining representative.

WE WILL NOT threaten our employees that we will be less competitive, resulting in probable cutbacks and layoffs, in the residential construction market if they select the Union as their bargaining representative.

WE WILL NOT inform our employees that we will drag our heels and prolong contract negotiations with the Union or that we are, by law, only required to bargain with the Union once per month for an hour, thereby threatening our employees with the futility of selecting the Union as their bargaining agent.

WE WILL NOT promise our employees a wage increase and fully paid medical and dental insurance if they vote against the Union as their bargaining representative.

WE WILL NOT discharge our employees because we believe they are leading proponents of the Union or discharge other employees in order to disguise our actual

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

intent for discharging employees, who, we believe, are Union proponents.

WE WILL NOT lay off employees for lack of work without giving prior notice to the Union and without affording the Union a prior opportunity to bargain over the decision to lay off employees and the effects of said layoffs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer our employees, Robert Atteberry, Robert Rupp and Todd Ewoldt, Hickman, Billsby, Mathers, Kennedy, McPhie, and Taylor, immediate and full reinstatement to their former jobs or, if those no longer exist to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings and other benefits resulting from their discharges.

WE WILL, within 14 days from the date of the Board's Order, remove from the files any references to the unlawful discharges and layoffs, and WE WILL, within 3 days thereafter notify the employees in writing that this has been done and that the discharges/layoffs will not be used against them in anyway.

WE WILL, on request, bargain with the Union in good faith about the decisions to lay off our employees Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor and about the effects of said layoffs.

KAJIMA ENGINEERING AND CONSTRUCTION, INC.

David Lujan, Scott Feldman, and *Steve Wamser, Esqs*., for the General Counsel.

John Erickson and *Kenneth Ivory, Esqs*., of Henderson, Nevada, for the Respondent.

David Koppelman, Esq., of Pasadena, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original, first and second unfair labor practice charges in Case 28–CA–14029 were filed by International Union of Operating Engineers, Local 12, AFL–CIO (the Union) on December 5 and 13, 1996, and January 28, 1997, respectively, and the unfair labor practice charge in Case 28–CA–14076 was filed by the Union on January 14, 1997. Based on the unfair labor practice charges, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint, alleging that Kajima Engineering and Construction, Inc. (the Respondent) engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the alleged unfair labor practices. As scheduled, a hearing was held before me on April 29 and 30 and May 1, 1997, in Las Vegas, Nevada. At the hearing, all parties were allowed to examine and to cross-examine all witnesses, to present all relevant oral and documentary evidence,[1] to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for each party and have been carefully considered. Accordingly, based on the entire record, including the posthearing briefs and my observations of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of California corporation, is engaged in the heavy construction industry and maintains an office and place of business in Las Vegas, Nevada. In the normal course and conduct of its business operations during the 12-month period ending December 5, 1996, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Las Vegas, Nevada place of business goods and products valued in excess of $50,000, directly from sources outside the State of Nevada. Respondent admits that it has been, at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaint alleges and counsel for the General Counsel argue that Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by informing employees that, if they selected the Union as their bargaining representative, it would close the Las Vegas facility; by interrogating employees about their own union activities and sympathies and those of their fellow employees; by informing employees that, if they rejected the Union as their bargaining representative, it would give employees a pay raise and certain health insurance benefits; by informing employees that, since they were not professional enough to work for the Union, they would be laid off if the employee selected the Union as their bargaining representative; by informing employees that Respondent would be less competitive if they selected the Union as their bargaining representative; and by informing employees that, if they selected the Union as their bargaining representative, it would only do the bare minimum and prolong contract negotiations as long as possible. Further, the consolidated complaint alleges, and counsel for the General Counsel argue, that Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act by discharging employees Robert Atteberry and Robert Rupp on October 25, 1996, and employee Todd Ewoldt on December 9, 1996, because each engaged in support

[1] In their posthearing brief, counsel for Respondents assert that "Respondent's attempt to present evidence and make a record . . . was severely limited by the court." While it is true that I voiced skepticism at aspects of Respondent's defense regarding the alleged violations of Sec. 8(a)(1) and (5) of the Act and closely questioned counsel as to their contentions, I have been unable to find, and counsel failed to point out, one instance in the record where Respondent was not permitted to offer evidence as to their defense to the consolidated complaint allegation. Indeed, there were several occasions, whether after some oral argument or in overruling objections from counsel for the General Counsel or counsel for the Union, in which I specifically noted that Respondent should be permitted to make its record on the issue.

for the Union. Finally, the consolidated complaint alleges and counsel for the General Counsel argue that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by unilaterally, and without bargaining with the Union, changing its bargaining unit employees' terms and conditions of employment and laying off employees Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor and by laying off the employees without notice to and offering to bargain with the Union over its decision to lay off said employees and the effects of the layoffs. Respondent denies that it engaged in any unfair labor practices and contends that the terminations of employees Atteberry and Rupp were based on their refusals to perform work assignments, that employee Ewoldt was laid off due to a lack of work, and that, as such resulted from a change in the direction of its business operations, it was not obligated to bargain over the layoffs of employees Hickman, Billsby, Mathers, Kennedy, McPhie, and Taylor.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent, a wholly owned subsidiary of Kajima USA, which, in turn, is a wholly owned subsidiary of Kajima, Inc., a Japanese corporation, is engaged in the heavy civil construction industry throughout the United States, performing earth moving, excavation, and earth leveling work on projects such as bridges, tunnels, and highways. Through the fall of 1996, Respondent, which was incorporated in 1984 and has its corporate headquarters in Pasadena, California, maintained four regional offices, including one in Las Vegas, Nevada,[2] and 15 project offices throughout the country. The record establishes, with regard to Respondent's Las Vegas office, that Lee Atkins was the regional manager until December 1, 1996, at which time he was demoted to a project manager position, John Prlina has been the project manager in charge of the earth work department, and Bill Matovich has been the superintendent in charge of earth moving operations in the Las Vegas area[3] and that, in December 1996, concurrent with the downgrading of the Las Vegas office from that of a regional to a project office, Takefumi Takuma, a corporate officer, was transferred to Las Vegas in order to supervise the project managers' work and overall office management. The record further establishes that, subsequent to the filing of a representation election petition, in Case 28–RC–5455, by the Union, seeking to become the collective-bargaining representative of Respondent's employees, who perform the work traditionally performed by operating engineers, including but not limited to equipment operators, mechanical and maintenance personnel, surveyors, and grade checkers, in southern Nevada, an election was conducted on October 24, 1996, and that the Union was selected by the employees as their exclusive collective-bargaining representative, with the result certified by the Regional Director for Region 28 on November 4, 1996.

The consolidated complaint alleges that Respondent committed several violations of Section 8(a)(1) of the Act prior to and on October 24, the day of the election. In this regard, there is no dispute that Respondent conducted a preelection mandatory meeting for eligible voters at the Mardi Gras Hotel in Las Vegas on Thursday, October 17. Atkins, Prlina, and Matovich conducted the meeting in one of the hotel's meeting room, with Atkins giving a short speech and answering employee questions. Brent Shreeve, who worked for Respondent from May through December 1996 initially as a "blade" operator and then as a foreman on a Del Webb jobsite,[4] testified that Atkins "stated that if the Union was brought in to [sic] the company that half of the work force would be laid off because they could not compete with fellow contractors around town and the other half of employees would be laid off because their skills are not qualified to be Union represented." Alleged discriminatee, Robert Rupp, during cross-examination, recalled Lee Atkins saying "that we didn't really want to sway either way on the Union but . . . that if we did go with the Union . . . there might be some cutbacks. Kajima would not be as competitive as they were in the residential" construction market. Later, during cross-examination, Rupp testified that Atkins' above comment came as a response to a question regarding possible layoffs. Further, asked if Atkins indicated that a certain course of action would follow union certification, the alleged discriminatee recalled the former saying "if we go Union we wouldn't be competitive. They'd have to cut back on their crew. They wouldn't have as much work."[5] Finally, when asked, by Respondent's counsel, if Atkins said anything about pending negotiations, Rupp testified he averred "that they could drag their heels and make it go on forever." Also, alleged discriminatee, Todd Ewoldt, testified regarding Lee Atkins' comments during the Mardi Gras Hotel meeting, recalling that the latter did most of the speaking about the Union, saying, about contract negotiations, "to show good will he would only have to give five minutes a month toward negotiations. He discussed also a cutback in work . . . as they would have to start bidding different projects other than residential if they were going to go Union."[6] Asked if Atkins said what result would follow a cutback in work, Ewoldt replied, "layoffs, cut back in workforce." During cross-examination, Ewoldt recalled Atkins saying that electing the Union would effect the competitiveness of the company "and that they would have to focus on another line of construction."

Lee Atkins, who recalled the meeting lasting for over an hour and a quarter, John Prlina, and Bill Matovich testified regarding Atkins' comments during the preelection Mardi Gras Hotel employee meeting. With regard to the matter of Respondent's ability to compete if its employees voted for union repre-

[2] The types of projects upon which Respondent worked in the Las Vegas, Nevada (southern Nevada) area appear to have differed significantly from the types of projects on which it worked in other areas of the country. Thus, while elsewhere Respondent normally worked on long duration public works projects with bid and project costs in the millions of dollars, its work in southern Nevada was normally short duration residential type jobs with bid prices normally far below $1 million.

[3] Respondent admits that at all times material Atkins, Prlina, and Matovich have been supervisors and its agents within the meaning of Sec. 2(11) and (13) of the Act.

[4] Respondent admitted that, as a foreman, Shreeve was a supervisor and its agent within the meaning of Sec. 2(11) and (13) of the Act.

Shreeve's credibility is a point of contention here. In this regard, he testified that he had been attempting to become a member of the Union for 17 years, that, prior to quitting his job with Respondent, he placed his name on the Union's out-of-work list, and that, subsequent to quitting his job, he became a member of the Union in order to make it easier for him to find work.

[5] Rupp recalled that Atkins said such would "probably" occur.

[6] Ewoldt said that, as he entered the meeting room, he also heard Matovich saying to another employee "that we would not have any more residential work."

sentation, while Atkins recalled averring that, if such were to happen, there was a "possibility" that Respondent would be less competitive, Matovich recalled the former saying that, if the Union forced Respondent to pay higher wages, Respondent wouldn't receive as many projects in a competitive market and that, if employees wanted the Union, the Company would not be as competitive and might lose some work. According to Prlina, Atkins spoke about an effect of becoming a union contractor, saying such might force Respondent "to look at . . . different markets than we are currently in . . . ." Prlina recalled employee questions regarding a 401(k) retirement plan, future raises, and health insurance. Atkins testified that employees asked questions regarding the possibility of a raise because "basically we hadn't given any raises out there" and regarding health insurance coverage, specifically whether Respondent would be willing to pay the entire cost instead of the current program pursuant to which the employees were responsible for half the cost. Asked if he said that the employees would not be professional enough to work for the Union, Atkins said "not in those words," but "I believe I did make the comment that once we went Union . . . there was probably people among us that I would not call out as a Union operator at the higher wage . . . ." Further, while denying saying Respondent would do the bare minimum to prolong contract negotiations as long as possible, Atkins admitted saying his understanding was that "by law, that at least once a month we have to sit down with the Union and show good faith efforts of negotiations for at least an hour per month."

Robert Rupp recalled two similar instances of interrogation by management officials prior to the election. According to him, the first occurred at least a month prior to the election at the Seven Hills golf course project. On this day, he was operating a rock-hauling truck, John Prlina was operating a loader, and they spoke as each was finishing his work. Prlina asked "what do I think and how . . . did I think the other employees thought about the Union . . . ." Prlina continued, saying "he knew that they'd have to bid the jobs higher and . . . the market in the residential building would not be as good for a Union company as non-Union."[7] Rupp testified that the second interrogation occurred a week before the election while he was operating Respondent's screening plant on Sahara Avenue in Las Vegas.[8] According to him, Matovich approached and "asked how I thought about the Union coming in and how other employees might think about it . . . ." Continuing, Matovich said "that there might be layoffs" and, in said regard, mentioned "the competitiveness of Kajima with being Union."[9]

Brent Shreeve testified with regard to two allegedly unlawful statements prior to the election—one communicated by him to employees pursuant to Bill Matovich's instructions and one by Bill Matovich, during which he was present.[10] With regard to the former, Shreeve testified that, on the morning of the day of the election, October 24, 1996, he spoke to Matovich at the equipment line up at the Del Webb jobsite, and he "asked me if the guys were going to go Union and I told him . . . I didn't know how they were going to vote and he proceeded to tell me that Lee Atkins offered us a dollar an hour raise and they would pay for all of our medical, dental insurance come January 1st, 1997 if we voted no on the Union." According to Shreeve, Matovich then instructed him to inform the employees, whom he supervised, of Atkins' offer, and, thereafter, he (Shreeve) reported Atkins' offer to approximately 20 employees (including alleged discriminatees Atteberry, Rupp, and Ewoldt and employees Bucky Taylor, George Carr, Dave Tucker, Dan Grill, Steve Cummins, Vince Buffolino, and Brett Morgan) on the jobsites, at which he was the foreman.[11] Placing the conversation a couple of days prior to the election, Ewoldt corroborated Shreeve's testimony, stating that the latter approached him on Respondent's Summerlin jobsite and "told me that the management was offering a dollar an hour raise and was wanting to pick up our benefits if the Union was voted out." No other witness, including Rupp, who testified extensively regarding alleged violations of Section 8(a)(1) of the Act, corroborated Shreeve's testimony, and Matovich specifically denied relaying such an offer, from Atkins, to Shreeve or instructing the latter to relay the offer to the employees.

With regard to Matovich's other allegedly unlawful comment, Shreeve testified that, on the same day, October 24, in the afternoon, Matovich again approached him near the equipment line up at the Del Webb jobsite. Todd Ewoldt was standing with him, and "Matovich asked . . . Ewoldt how he was going to vote on the Union. [Ewoldt] replied . . . that it was confidential and he did not care to discuss that with Mr. Matovich. So Mr. Matovich got a little upset and shook his head and got in his truck and drove away." Placing the incident in the days immediately preceding the election, Ewoldt corroborated Shreeve, testifying that, as the employees were parking the equipment and walking to their cars, Matovich "pulled in front of us with his truck and kind of headed us off and called my

[7] Prlina admitted that such a conversation occurred and that "I knew Robert pretty well as an employee. And . . . we had a very light conversation about . . . how he felt like the Union vote might go."

[8] At its screening plant, Respondent operates machines, into which contaminated materials are dumped and separated into component materials.

[9] Notwithstanding testifying extensively as to the issued raised during the hearing, Matovich failed to deny the occurrence of or the substance of this alleged act of interrogation.

[10] Although not alleged as violative of the Act, Shreeve testified regarding an August 1996 conversation between himself and Matovich at the Stadium Saloon bar on Boulder Highway in Las Vegas. "Bill Matovich generally asked me if I knew any knowledge about the Union organizing . . . and I told him I didn't know so he proceeded to tell me that if the company was to go Union that chances are they'd shut the company down and move the company out of town." During cross-examination, Shreeve expanded upon what Matovich told him, stating that the latter said "that the company was against the Union and if we voted in the Union they could not [compete] with other contractors around town. So that would force them to lay everybody off, close the doors and move the company out of town." While believing that, inasmuch as Matovich was aware that Shreeve had worked with the employees, whom he supervised, "for years," Matovich's intent was for him to act as a conduit and repeat his comments to the employees, Shreeve denied that Matovich asked him to do so or that he informed employees as to what Matovich said. Notwithstanding Shreeve's denial, par. 7(a) of the consolidated complaint alleges that Shreeve threatened employees with closure of the business if they selected the Union as their collective-bargaining representative. Moreover, while counsel for the General Counsel unsuccessfully sought to withdraw the allegation presumably in an effort to enhance Shreeve's credibility, alleged discriminatee Ewoldt testified that, prior to the election, Shreeve told him that, if employees voted for the Union, Respondent "could pull out and just leave the valley." During cross-examination, Ewoldt recalled Shreeve saying such was a "possibility."

[11] During cross-examination, Shreeve testified that he reported Atkins' offer to the employees on October 23—the day before the election.

name and asked me how it was going . . . and he then asked me how I was going to vote and I really didn't give an answer. . . . Then he asked me . . . how the vote was going to go, and I said I didn't know and I walked away . . . ." Matovich failed to deny the occurrence of and substance of this conversation.

The consolidated complaint alleges that employees, Robert Atteberry and Robert Rupp, were unlawfully discharged by Respondent on the day after the election, October 25. According to the union official, James Guin, Atteberry[12] was the employee, who initially contacted the Union with regard to organizing Respondent and who obtained most of the authorization cards prior to the filing of the election petition, and there is no dispute that Atteberry acted as the Union's observer during the election. Rupp testified that, during the preelection campaign, he worked with Guin, attended organizing meetings, and answered employees' questions about the Union, and Guin testified that Rupp assisted Atteberry in organizing Respondent's employees. Other than Atteberry's work as the union observer during the election, there is no evidence that Respondent was aware of his organizing efforts on behalf of the Union or of Rupp's support for the Union.

On the morning of October 25 both Rupp and Atteberry were assigned to work at Respondent's screening plant on Sahara Ave. in Las Vegas. According to Rupp, who was the leadman in charge of the operation of the plant,[13] they operated the equipment for 2 hours[14] but noticed, as a result of unusually strong winds, a large amount of dust coming from the machine and blowing toward a nearby large housing development. Rupp testified that, in these circumstances, he decided to shut down the screening plant machinery and that he placed a telephone call to Brent Shreeve to inform him of his decision, telling the former "that we were going to shut down. It was too dusty and we were going to go to the office and get our checks. We were going to go home for the day." According to Rupp, Shreeve agreed, and, as it was a Friday and payday, he and Rupp drove together to Respondent's office to obtain their paychecks.[15] Contradicting Rupp, Shreeve testified that, due to the excessive wind conditions that morning and to neighbor complaints about dust control, he decided that the screening plant could not operate in such conditions and "I told [Atteberry and Rupp] to shut it down for the day so we didn't get fined by EPA." Shreeve further testified that he telephoned Bill Matovich and told the latter about the windy conditions and his resulting actions, "and he agreed that was fine." Also, "I told him that I'd call the office and make sure that [Atteberry's and Rupp's] checks are at the office and they could have the rest of the day off." After concluding his conversation with Matovich, according to Shreeve, he told the two employees that they could have the rest of the day off and that they should go to the office to obtain their paychecks.[16]

Rupp testified that, when he and Atteberry arrived at the office, a secretary informed them that, mistakenly, their checks had been sent to a jobsite and that she had requested that the checks be routed to the office. Rather than inside the office, Rupp and Atteberry waited in the parking lot for the delivery of their paychecks. They were observed by John Prlina, who called from his office—"he said you're not running the plant today and I said it was too windy and he just said good call and went back in the office." Shortly thereafter, the employees' paychecks arrived, and, at approximately 10:30 or 11 a.m., as they were about to drive away, Bill Matovich called on Rupp's cellular telephone. Concerning what was said, Rupp testified, "He said he was at the Seven Hills project and he said he needed us. A couple of scraper hands [had not reported for work and he had a couple of scrapers sitting and needed operators for them] . . . . I says I'm already at the office. I had my check and I said I'd like to take the rest of the day off." After a moment, "he asked the same question again and I said well, Bill, I'd kind of like to take the rest of the day off . . . if you don't mind." To this, Matovich replied, "Well, okay and he hung up."[17] Later that day, Rupp was informed by Atteberry that they had been fired. The former telephoned Respondent's office, and a secretary confirmed what Atteberry had reported.[18]

As to Respondent"s defense, Bill Matovich testified that, early in the morning on October 25, he was at the Seven Hills project and was faced with the failure of two scraper drivers[19] to report for work. At approximately 7:45 a.m., Shreeve telephoned him and reported that he had shut down the screening plant for the day. "I said what did you do with the operators and I said I need operators on another job . . . . he said they went to the office to get their checks. It was on a Friday . . . . He said I told them there was no work . . . . I said . . . I need them. I've got two operators who didn't show up."[20] According to Matovich, immediately after concluding his phone call with Shreeve, he telephoned the office and was informed that Rupp and Atteberry were standing in the parking lot. Believing the two employees were together and knowing Rupp's cellular telephone number, Matovich placed a telephone call to Rupp and spoke to him. Respondent's Exhibit 2, Matovich's cellular telephone billing record, establishes that the said telephone call was placed at 8:20 a.m. and lasted for just 66 seconds. Under questioning by counsel for the General Counsel, Matovich gave the following account of his conversation with Rupp: "I asked Mr. Rupp if him and Bob could come out. I had two scraper

[12] Atteberry was ill and did not testify at the hearing.

[13] Shreeve was the immediate supervisor for Atteberry and Rupp.

[14] Rupp's testimony was contradicted by Shreeve's handwritten notes, which establish that the screening plant was not operated at all on October 25.

[15] Atteberry rode to work that day in Rupp's car.

[16] Shreeve said he did not transfer the two employees to another jobsite for the day as "I had all the guys I needed to run all the equipment that day. I had no other use for them."

[17] Rupp specifically denied that Matovich warned that he was subject to discipline, that Matovich asked that Rupp relay his message to Atteberry or mentioned the latter's name, that he informed Atteberry about Rupp's request, and that he spoke to Atteberry during the conversation.

[18] Brent Shreeve testified that, approximately 1-1/2 hours after sending Atteberry and Rupp to the office, he met Matovich at Respondent's Pulte Holt jobsite, "and he proceeded to tell me that he had fired [Atteberry and Rupp] for refusing to run scrapers" on a job at the "7 Hills golf course project" and that "if they return on the jobsite, I'm supposed to fire them immediately." Respondent's termination reports for each alleged discriminatee reads, "Refused to run scraper on 10/25/96 when requested. 'Refused work Assignment.'"

[19] A scraper machine is a large item of equipment with a large dirt scraping mechanism underneath, which is used to move dirt a short-haul distance of 200 to 300 feet to where a fill is needed and which is usually pushed by a bulldozer.

[20] While denying that Shreeve ever said he had given the two employees the day off, Matovich conceded that, by informing him the employees were going to the office to pick up their paychecks, Shreeve meant that Rupp and Atteberry had been given the remainder of the day off.

hands that didn't show up . . . . and we were on a deadline. I needed the help. And, Bobby said that they had other plans and I asked him to please come help me. I needed them bad." Rupp replied that he would speak to Atteberry; the former came back on the line a few seconds later,[21] and "and said no, we can't do it. We have other plans." Matovich again asked, and Rupp again declined to work. Ultimately, according to Matovich, after having requested Rupp's and Atteberry's help "three times," he "said fine, if that's the way you feel, I'll get someone else."[22] Matovich testified that both employees were paid for 2 hours of work that morning and that, therefore, each was on companytime at the time of his telephone conversation with Rupp.

According to Matovich, a half hour later, he telephoned John Prlina, who was in the company office, and "I just told him I was upset because I had [two] operators . . . refuse to run my machines and . . . I have a notion to fire them for the simple reason of you don't refuse to run equipment when you're . . . still on company time . . . . He said do what you want to do." Thereupon, Matovich testified, he "just called the secretary and told her to terminate [Rupp and Atteberry]."[23] Moments later, Matovich changed his testimony, stating that, rather than saying "do what you want to do," Prlina actually ended their conversation, saying "do you want me to go ahead and terminate them then" and that, rather than him doing anything further, Prlina took care of the terminations and he had nothing more to do with the matter at that point. Matovich denied that the subject of the Union was discussed during this conversation.

John Prlina testified that his conversation with Matovich occurred at approximately 9:30 a.m. that morning, and Matovich said that two scraper hands had failed to report for work at Seven Hills, that he had telephoned Brent Shreeve and requested that, as the screening plant could not operate, Atteberry and Rupp be sent to Seven Hills, and that Shreeve told him the two employees were on their way to the office to obtain their paychecks. According to Prlina, Matovich next said that he then "contacted" Rupp and requested that he and Atteberry report to Seven Hills but that Rupp said they had other things to do that day and did not want to report to Seven Hills. Matovich added that he "pleaded" with the employees, who continued to refuse to report to the other jobsite. Contradicting Matovich, Prlina stated that the Union was mentioned by the former, who, while having authority to terminate employees, felt "uneasy" doing so in these circumstances as Atteberry had been the Union's observer during the election. Thereupon, according to Prlina, he spoke to Lee Atkins, the then regional manager, about the situation, "and we determined that we should terminate Robert Rupp and Robert Atteberry . . . for refusing a work assignment." Prlina added that they decided that such conduct could not be condoned especially when "both employees were still on the clock."[24]

With regard to the existence of a policy or practice concerning employees, who refuse to perform work assignments, while unable to recall the names of any other employees, who had been terminated for refusing work assignment, Bill Matovich insisted that Respondent's policy is to terminate any employee, who refuses to perform a job, and that there is no policy, permitting an employee to refuse to perform a job. However, when asked, by counsel for the Union, whether, every single time an employee declined a job, he fired the employee, Matovich altered his testimony, replying, "I don't know how to put it into words. No, there's times, yes. It's either let certain things slide and there's times you don't let things slide. . . . It depends on the circumstances." Asked why he did not let what Atteberry and Rupp slide, Matovich answered, "Because it had been happening a lot to us and on this particular job we were on a deadline schedule. . . . it was due to the fact of the nature of the job."[25] In contrast, John Prlina was unequivocal, saying that Respondent's policy for "refusing a work assignment is termination. We feel that . . . if we did not terminate workers for refusing a work assignment . . . would result in workers that wanted to work at will . . . ." He then added that, while Respondent never had been confronted with employees refusing to perform assigned work prior to Atteberry and Rupp, employees have been terminated for refusing to follow work instructions, for abusing company equipment, and for refusing to operate a

[21] While testifying on behalf of Respondent, Matovich estimated that the amount of time taken for Rupp to confer with Atteberry was "like five seconds or ten seconds."

[22] Asked if he told Rupp that his and Atteberry's jobs were placed in jeopardy by refusing to honor Matovich's request, the latter said, "I believe to the tone of my voice he got the hint. I directly never told him though."

Testifying on behalf of Respondent, Matovich recounted two similar versions of his telephone conversation with Rupp. Questioned by counsel for Respondent, Matovich recalled the following version of the telephone conversation: "So I called Robert up, and told him needed him and Bob Atteberry to come out and run the scrapers for me." Rupp responded that they had "other plans," and, after Matovich "emphasized" that he "really needed them," Rupp asked Matovich to wait while he spoke to Atteberry. "He talked for a little bit to [Atteberry], and come back on the phone and said, 'No, we can't make it. We got other plans.'" According to Matovich, he "repeated, I said, 'Bob, I'm in a big bind here,' I said, 'We've got a schedule to meet, and I've got two scrapers that I need to run. I'd appreciate if you guys would please come out and run those scrapers.' And he said, 'No, we've got other plans. . . . we can't do it.'" After the introduction of his cellular telephone billing record, Matovich gave the following account of the telephone conversation: "I called him, and I'm direct . . . I said, 'Bobby, I'm in dire need of two scraper hands, could you and . . . Bobby Atteberry please come out and run these . . . two scrapers? I need you.' And he said, 'Well, we had other plans.' And I said, 'Bob I need you bad, please.' He said, 'Just a minute, I need to talk to Bob Atteberry' . . . . So he just like five seconds or ten seconds, and then he come back 'No,' he says, 'we can't do it, we have other plans.'" To this, Matovich responded "fine" and "I'll get someone else to do it" in a "stern enough voice."

[23] Matovich testified that, while Prlina drafted the language on the employees' termination documents, the reason was what occurred–Rupp and Atteberry were terminated for refusing work assignments.

Matovich denied that Respondent's normal practice was to permit employees to have the day off when their assigned jobs were not capable of being performed and stated that days off were only permitted when sought "in advance," which would enable the company to work around the employee. Confronted with his pretrial affidavit in which he stated, "I would usually allow them to take the day off but I was under pressure on the job to get it finished," Matovich said that such was "right."

[24] While the inevitable conclusion from the testimony of Prlina is that the discharge decision was a joint one between himself and Atkins, the latter, during his testimony, contradicted Prlina, specifically denying any role in making the said decision—"the superintendent made a decision that he wanted to terminate. He took that decision to the project manager who was his boss and that individual came to me *and basically advised me . . .. of what they were doing*." (Emphasis added.) Atkins testified that the discharge decision had been reached prior to his involvement and that he merely indicated his agreement with it.

[25] Matovich failed to offer any corroboration for this assertion.

bulldozer unless windows were installed and that Respondent has never permitted a refusal to perform a assignment slide.

As to whether Respondent had an urgent need for scraper operators at its Seven Hills jobsite on January 25, there is no dispute that Respondent was preparing an area for the construction of model homes; that two scraper drivers, Jon Smith and Ron Hollewell, failed to report for work; and that each was scheduled to operate a model 637D scraper.[26] General Counsel's Exhibit 5, Respondent's time and equipment reports for the Seven Hills jobsite, reveals that two scrapers were operated on Saturday, October 19; that not only were the two scrapers not operated on Friday, October 25, but also neither was operated on Saturday, October 26; and that, while each scraper was utilized on Monday, October 28, no overtime was worked. Asked why no scraper was used on October 26, Matovich explained that Respondent always performs "catch up work" on Saturdays with a skeleton crew and "our deadline runs on a forty hour week and our scrapers would have been on overtime," which Respondent did not want to pay. On this point, asked by counsel for the General Counsel whether, on Saturday, October 26, Respondent was caught up with scraper work to the point that operation of the scraper machines was not necessary, Matovich answered, "Yes."[27] John Prlina testified that Respondent was "under the gun" to finish its work on the model home area. However, after initially stating that "heavy ripping" work is done on Saturdays and that "if we had run scrapers on Saturday, the dozers would have been tied up pushing [them] and would not have been able to loosen up enough material to make next week's production possible," he later admitted not possessing "intimate knowledge" as to the condition of the parcel on the Seven Hills job on October 26.

Turning to the allegedly unlawful discharge of Todd Ewoldt, the record establishes that he was hired, by Respondent, in August 1995; that his primary position was as a scraper operator;[28] that, during his job tenure with Respondent, he was "moved around" from job to job; and that, at the time of his allegedly unlawful discharge, he was working on Respondent's Del Webb jobsite in Summerlin. While Union Official Guin stated that Ewoldt helped Atteberry during the Union's organizing campaign, the former did not testify with regard to any activities, if any, in which he engaged in support of the Union, and Guin's testimony was, thus, uncorroborated. Also, while there is no evidence that Respondent was aware of Ewoldt's support for the Union or of any union activities in which he may have engaged, the General Counsel obviously desires that the inference be drawn that Respondent suspected his involvement in the Union's organizing effort and acted on it. Thus, former supervisor, Brent Shreeve, testified that, the morning after Matovich's interrogation of Ewoldt, during which he (Shreeve) was present, Matovich again approached him at the Del Webb jobsite, and "he asked me again if the guys were going to vote yes on the Union. I told him I did not ask them . . . . and then he proceeded to tell me if they did not say anything then apparently they must be going Union and, if they go Union . . . he is going to fire Todd Ewoldt." While Shreeve failed to testify that he informed Ewoldt of Matovich's intent, the alleged discriminatee testified that, on the day following his alleged interrogation by Matovich, Shreeve reported to him "that Matovich had told him if this Union thing would pass that I was going to be terminated."[29] The Union was, of course, victorious in the election; approximately 6 weeks later, on December 9, 1996, Foreman Bruce Kellogg approached Shreeve and said, "I was being laid off for reduction of force."

Ewoldt testified that, on the Del Webb project, Respondent's employee complement "varied from day to day. They'd ship guys in and out." He added that there were eight or nine employees working with him on December 9; that he was the most senior employee and "everyone else had been pretty much short time"; that he had been required to teach some of the remaining employees, including Kelly Deadwiley, how to operate the 637D scraper; and that no other employees, including Deadwiley, were laid off with him. As to the matter of layoffs, Ewoldt testified that "for as long as I'd been there, nobody had ever been laid off . . . . they just moved people around from job to job."

Bill Matovich testified that Ewoldt was laid off on December 9 as "our job was winding down and we were out of scraper work." Echoing Matovich, Prlina testified that "we were slowing down at that time . . . . we were turning scrapers back in. Our scraper load was going down . . . ." He added that Ewoldt was "hired as a scraper operator . . . and the only thing he ran . . . was either a scraper or a water pull . . . ." However, contrary to an asserted decline in scraper work at the Del Webb job, examination of General Counsel's Exhibits 6 through 11, the time and attendance reports for the job in Summerlin, discloses that, in week prior to Ewoldt's layoff, Respondent operated two 637D scrapers each day; that, from the day of Ewoldt's layoff (December 9) through January 6, 1997, Respondent continued to operate two 637D scrapers almost every day; and that the lesser experienced employee Deadwiley operated a scraper on several of those occasions. Moreover, Bill Matovich testified that, at the time of Ewoldt's layoff, Respondent had other ongoing projects, including Pulte Homes, Victor Valley, and Rancho Town and Country Club, which continued through January 1997, and that, at each of these, Respondent continued to require operation of scraper machines.

While Matovich specified a decline in scraper machine work as the only reason for laying off Ewoldt, Prlina said another factor in Respondent's decision to lay off the alleged discriminatee was excessive absenteeism—specifically that he had worked just two 40 weeks in his final 14 weeks of employment; however, Respondent failed to offer any of Ewoldt's attendance records, as corroboration for Prlina's assertion. Questioned

[26] For its projects during the fall of 1996, Respondent utilized six 637D scrapers–four were leased and two, numbers 301 and 302, were owned by Respondent. Smith was scheduled to operate the No. 301 scraper on October 25 and Hollewell was scheduled to operate the No. 302 scraper that day.

[27] Matovich admitted that neither scraper machine was operated on the following Saturday as there was no need to catch up on scraper work.

[28] Brent Shreeve, who testified that he was Ewoldt's immediate supervisor, stated that the alleged discriminatee had "excellent" qualifications and was able to operate "basically all the equipment that Kajima operated," including blades, scrapers, bulldozers, water pulls, and loaders. In contrast, Ewoldt was not quite as expansive, testifying that, while "the majority of my skills were on a scraper and that's where I was mostly needed," he did operate a bulldozer for a day, and "I ran a water pull for quite some time . . . . approximately three or four months . . . ." Nevertheless, he was paid as a scraper operator.

Bill Matovich testified that Ewoldt was qualified to operate the water pull machine and to perform grade checking work.

[29] Matovich specifically denied telling Shreeve that Ewoldt would be terminated if the Union won the election.

during rebuttal, Ewoldt denied that he failed to report for work when scheduled or that Respondent ever mentioned absenteeism as a problem. Moreover, Prlina admitted that he only examined Ewoldt's attendance records on the day before he testified.

Finally, regarding the consolidated complaint allegations, that Respondent violated Section 8(a)(1) and (5) of the Act by laying off employee, Robert Hickman, on December 26, 1996, employees, Dan Billsby, Jim Mathers, and Guy Kennedy, and Justin McPhie, on December 31, 1996, and employee, Bucky Taylor, on January 8, 1997, Respondent conceded that it laid off the above-named employees and that it did so without giving prior notice to the Union, and there is no record evidence, nor is there any such contention, that, prior to effectuating each of the layoffs, Respondent afforded the Union an opportunity to bargain over its decision to lay off each of the above employees or over the effects of the layoff. On this point, Union Official Guin testified that, during December 1996 and January 1997, he was not notified of any layoffs by Respondent and did not learn of the above layoffs until he compared a list of current employees, which had obtained during contract negotiations with Respondent, with those set forth on the election eligibility list. Thereafter, according to Guin, he spoke to Prlina and Atkins, by telephone after a bargaining session—"I indicated that the layoffs were unilateral changes and they were items that should be brought up in negotiations . . . . [Prlina] indicated that he did not agree with me. That he felt that he had the right to go ahead and terminate the people however he saw fit."

Several individuals testified that, prior to the above layoffs, Respondent had maintained a consistent practice of not laying off its employees when projects neared completion. Thus, as stated above, alleged discriminatee Ewoldt testified that "for as long as I'd been there, nobody had ever been laid off" and that rather than doing so when jobs were winding down, "they just moved people from job to job." Likewise, former Supervisor Shreeve testified that Respondent's policy when work on a particular project ended was to "transfer you to another jobsite" and that he had been transferred from one job to another on four separate occasions when work on one was about to end. Also, according to Shreeve, on becoming a foreman, "guys that finished off my jobsite when I got slow, they did transfer them to other jobsites." Continuing, Shreeve said, "What I would do is I would tell Mr. Matovich I did not need these guys and he would switch them to other jobsites." That the foregoing was, in fact, Respondent's past practice is certain as Takefumi Takuma, who was placed in charge of Respondent's Las Vegas office in December, gave the following explanation as to why employees were laid off rather than given other jobs—"because jobs that they were on were finished, and other jobs that . . . were still going on had a staff already working on the jobs. Therefore, people who were on the jobs which were finished, they don't have no place to go."[30]

Respondent contends that it had no obligation to bargain with the Union over its decision to lay off employees in December 1996 and December 1997 inasmuch as the layoffs were a direct consequence of management's decision to change the scope and focus of its Las Vegas, Nevada construction work bidding from the mostly nonunion residential market to the union signatory contractor-dominated public works and commercial markets. In this regard, Takefumi Takuma testified that, prior to 1990, Respondent's nationwide business primarily involved working on Japanese-owned projects but that, commencing in 1990, due to a decline in the Japanese economy, except for the southern Nevada area, Respondent began bidding on and performing work on large public works projects. Takuma testified that, while such "was successful in terms of the work volume we got," public works construction "was not successful in terms of profitability." According to Takuma, Respondent experienced severe profit margin problems, resulting from its penchants for bidding far too low on projects to ensure any sort of profit or to even meet costs and for bidding on projects without having project managers in place. Accordingly, commencing in 1994, "the . . . company started to realize a large amount of losses, with such reaching $75,000,000 in 1996." As a result, Kajima Corp. began to oversee Respondent's business practices, and cost reduction measures were immediately implemented, including the closure of three regional offices, the layoffs of management personnel, the downgrading of the Las Vegas office to a project office and, thereby, effectively confining project bidding to the Las Vegas rather than a wider geographic area, and the demotion of Lee Atkins to project manager status and the transfer of Takuma to Las Vegas. In addition, nationwide bidding and project guidelines were implemented including a decision to concentrate Respondent's work in the west coast States, a limitation on the size of projects to those in the $20 million to $50 million price range and no more than 10 active projects at any one time, a requirement of a 65-percent profit margin on any bid, the necessity of a project manager on hand at the time of a bid, and a requirement that projects must be granted approval prior to bidding. Finally, with regard to southern Nevada, in which area Respondent's Las Vegas office had confined its bidding to the nonunion residential market, losses also resulted from Respondent's business practices, and "we were told to analyze the reasons of the losses in the Las Vegas office . . . and we could not bid any jobs for a long time. As a result, the backlog shrunk very quickly . . . a lot of jobs were being finished" because the nature of the work in Las Vegas was short duration type jobs. According to Takuma, this moratorium on job bidding in the Las Vegas office commenced in August or September 1996 and concluded "sometime in January, I would say," and, during the 3 or 4 months, the new Las Vegas office management team utilized the time to review the office's operations and to perform a cost analysis on each of those ongoing projects on which Respondent seemed to be losing money.

During his testimony, Takuma was careful to separate the reasons underlying the bidding moratorium and job-related decisions reached during the time period from decisions taken as a result of the Union's victory in the representation election. He testified that the former solely related to the profitability of existing jobs and that, as to the latter, Respondent understood that there undoubtedly would be changes in the types of jobs for which Respondent would bid—"we knew that . . . signing the [collective-bargaining agreement] was coming up . . . we were realizing that now we have to . . . look for different kinds of projects in a different market segment." Further, as to the moratorium, Takuma stated that future projects were not "at all" considered and "we just simply assumed that . . . the labor

[30] While Respondent's practice was to transfer people to other jobs rather than effectuating layoffs, it is clear that it has laid off employees in the past when no positions were available on other jobsites. According to the uncontroverted testimony of John Prlina, at least three employees, one in July 1996 and two in September 1996, were laid off when no positions were open on other jobs.

costs would stay the same through the end of . . . each project." Conversely, as to the effect of the Union's selection by its employees as their collective-bargaining representative, he conceded that Respondent's calculations as to the types of future projects, on which to bid, were directly related to labor costs—"I would . . . say yes . . . ." Eventually, according to Takuma, "beginning probably February . . . . 1997," Respondent gradually concluded that, given that "our work force [was] all Union workers," which meant its "labor costs [would be] more than before," and that, therefore, "our costs [would] be so much higher" for residential work, it could no longer compete in the construction market segment and would have to begin bidding on public works and commercial construction projects, the type of work with which Respondent was most familiar nationwide. Finally, with regard to whether Respondent's above-described December 1996 and January 1997 employee layoffs were related to the work moratorium or the gradually reached decision in February 1997 to change the emphasis of Respondent's southern Nevada construction work, Takuma admitted that the six affected employees were laid off "due to a lack of work" as the "jobs that they were on were finished, and other jobs that . . . were still going on had a staff already working on the jobs. Therefore people who were on the jobs which were finished, they don't have no place to go."[31]

Both Takuma and Lee Atkins testified to the significance of Respondent's decision to change the emphasis of its job bidding in the Las Vegas area to the public works and commercial construction markets and to the degree to which its employees' work would differ from their jobs on residential construction work. While Takuma termed the construction projects, for which Respondent's Las Vegas office is now bidding, "totally different" than the work, for which it previously bid and performed, and the change "substantial,"[32] he conceded that difference was "due to the unionization" and "our work force is all union workers. That means labor costs more than before." Atkins testified that Respondent's decision to enter the public works and commercial construction markets in the Las Vegas area was a change of direction for Respondent as there would be different contract requirements, penalties, management teams, and "job setups." However, while Atkins maintained that the work of the bargaining unit employees would not remain the same because "different types of equipment would more than likely be used," Takuma contradicted him, admitting that the type of earth moving construction work, which Respondent performs, would not be changed and that the bargaining unit employees would be performing the same work with the same equipment—bulldozers, scrapers, and water pull trucks.

Respondent also contends that the Union demanded to bargain over the effects of the layoffs of the six bargaining unit employees during negotiations for the parties' initial collective-bargaining agreement and that such effects bargaining did, in fact, occur. There is no dispute that Respondent and the Union commenced their contract negotiations in January 1997 and that the bargaining concluded with the signing of a collective-bargaining agreement on March 17. After initially testifying that, at a bargaining session on January 9 at the Union's office in Pasadena, California, "it was brought to our attention . . . about us laying off people," Lee Atkins testified that, at said meeting, "we advised the Union that we were laying people off" and that James Guin replied that he had a list of the people and that he was aware "for a fact" that Respondent had been laying off employees. "And I think . . . we advised them that . . . we laid people off and our jobs are coming to an end and we're going to continue to lay people off." Atkins testified further that the issue next arose at a bargaining session on January 23 during which meeting there was a lengthy discussion as to whether some individuals had been laid off or had voluntarily quit. According to Atkins, "it was brought to our attention that [the Union] wanted to discuss the individuals that were laid off . . . . They asked us our policy of laying off" and said they wanted notice thereafter.[33] "We told them we will lay people off . . . by seniority . . . if the skill of the individual meets the seniority requirements . . . they basically acknowledged that . . . give us something in writing . . . I believe it was asked about the . . . individuals we already laid off. And they said, 'Well, that's all right as long as you give us notice, from this date forward, of who you're [going to] lay off.'"

Mickey Adams, a vice president of the Union and the chairman of the Union's negotiating committee during the contract bargaining with Respondent, could not recall the general subject of layoffs being discussed during the bargaining other than in connection with alleged unfair labor practices. In this regard, the matter arose on or about March 6 or 7 when Respondent's negotiators asked the Union's representatives if the latter could assist with the unfair labor practice allegations, and "we told them we wanted to talk about it before they laid them off."[34] Specifically asked if he ever mentioned any of the six laid-off employees, who are named in the consolidated complaint, Adams said, "No, I'm not gonna sit here and say I did." However, when asked, by me, if he ever discussed, with Respondent, what the latter should do about the six employees, who had been laid off, Adams stated that, at the final bargaining session, there was discussion regarding a list of employees' names, which is attached to the collective-bargaining agreement, and "I told them . . . that . . . before we signed this contract I wanted every single employee to have the right to come in, even the ones that were terminated, and to have a right for re-employment . . . . And I told them, you can take your choice, but we want those guys to have the right to go back to work." He added that, in response, Lee Atkins provided the list, which is attached to the collective-bargaining agreement and which, apparently, contains the names of individuals, who had been employed by Respondent in the Las Vegas area. Examination of said list, an attachment to Joint Exhibit 1, reveals that the names of employees Hickman, Billsby, Mathers, Kennedy, McPhie, and Taylor are included among the names, and, according to Adams, "the intent of the list is that . . . when Kajima get work . . . we wanted them to go back to work." He added that Respondent agreed to this demand. During cross-examination, Adams acknowledged that those individuals,

[31] Takuma added that the six laid-off employees, who are named in the consolidated complaint, "would still be working" if the construction jobs had continued.

[32] Takuma defined what he meant by a "substantial change"—"the types of clients we'll be meeting will be totally different, and a totally different practice requires much more paperwork, types of engineers we have to hire, and cost base will be different."

[33] Atkins recalled that, either during this meeting or the January 9 meeting, the Union mentioned the names of the six laid-off employees, who are named in the consolidated complaint.

[34] Adams testified that this discussion was subsequent to the filing of the unfair labor practice charges.

whose names are set forth on the list, would be reemployed when, and if jobs became available.

B. Legal Analysis and Conclusions

Initially, I shall discuss the several acts and conduct, violative of Section 8(a)(1) of the Act, which, the consolidated complaint alleges, were committed by Respondent prior to the representation election on October 24, 1996. Respondent is alleged to have committed three separate acts of unlawful interrogation of its employees, two by Bill Matovich and one by John Prlina. With regard to the former, notwithstanding having specifically denied several other allegedly unlawful acts, Matovich failed to deny either of the interrogations, as to which Robert Rupp, Todd Ewoldt, and Brent Shreeve[35] testified, and, therefore, I shall credit the testimony of each as to what occurred. Accordingly, I find that, evidently anxious to discover the extent of support for the Union amongst Respondent's heavy machinery operators, grade checkers, and surveyors, and, possibly, the identities of the leading union adherents, Matovich interrogated employees, Rupp and Ewoldt; that, in the week before the election, he approached Rupp while the latter was operating the screening plant on Sahara Avenue, asking "[Rupp] how [he] thought about the Union coming in and how other employees might think about it" and warning that there might be layoffs given Respondent's competitive status as a union-signatory contractor; and that, a day or two before the election while Ewoldt and Shreeve were standing together near the parked equipment at the Summerlin jobsite, Matovich approached, called Ewoldt's name, and "asked me how I was going to vote" and, after the employee answered evasively, "he asked me how the vote was going to go . . . ." With regard to each, there is no record evidence that either Rupp or Ewoldt was an open and declared union adherent, nor is there evidence that Respondent was aware of either employee's support for the Union. Further, Matovich was a management official, there is no evidence that he had a social relationship or any type of friendship with either employee, and he gave no assurances against reprisals. Moreover, neither act of interrogation appears to have been part of a casual conversation but, rather, each appears to have been a calculated and deliberate attempt to gain information from an employee. I believe Matovich's interrogation of Rupp was particularly egregious, given that such was coupled with an explicit warning of layoffs. In the above circumstances, I find that each act of interrogation was coercive and patently violative of Section 8(a)(1) of the Act. *Dealers Mfg. Co*., 320 NLRB 947, 948 (1996). *Advance Waste Systems*, 306 NLRB 1020 (1992). As to the alleged unlawful conduct attributed to Prlina, Respondent's project manager admitted having interrogated employee Rupp, and the latter seemed to be honestly recounting his version of his encounter with Prlina. Notwithstanding his admission, as, in comparison to Rupp, he appeared to be the less credible witness, I shall rely on the employee's version of the incident. Therefore, I find that, like Matovich, anxious to ascertain the extent of sentiment for the Union amongst Respondent's employees, while working with Rupp at the Seven Hills project prior to the election, Prlina asked the former "what do I think and how . . . did I think the other employees thought about the Union" and added that "the market in the residential building would not be as good for Union company as non-Union." As stated above, there is no evidence that Rupp was an open and avowed supporter or that Respondent had any knowledge regarding his union sympathies. Moreover, Prlina was a high management official and there is no evidence that he and Rupp were friends or that he gave Rupp any assurances against reprisals. In these circumstances, I likewise find Prlina's interrogation to have been coercive, in violation of Section 8(a)(1) of the Act. *Advance Waste Systems*, supra.

A troubling[36] issue here concerns paragraph 7(a) of the consolidated complaint, in which it is alleged that Respondent, through Brent Shreeve, informed employees that, if they selected the Union as their bargaining representative, Respondent would close its Las Vegas, Nevada office. While Shreeve, who testified that Bill Matovich had informed him, in August, of Respondent's intent to move out of Las Vegas if the Company went Union,[37] denied having done so,[38] I rely on the contrary version of events of the more credible Todd Ewoldt. Therefore, I find that, prior to the election, Shreeve essentially repeated what Matovich told him, warning Ewoldt that, if the employees voted for the Union, Respondent "could pull out and just leave the valley." Such a threat, as uttered by Shreeve, is, of course, utterly coercive and has long been considered one of the so-called hallmark violations of the Act. *Tufo Wholesale Dairy*, 320 NLRB 896, 903 (1996); *Harpercollins Publishers, Inc*., 317 NLRB 168, 186 (1995). Accordingly, I find Shreeve's threat of office closure to have been violative of Section 8(a)(1) of the Act.

Turning to the consolidated complaint allegations, that certain of Lee Atkins' comments to the assembled employees during the preelection meeting at the Mardi Gras Hotel on October 17, 1996, were violative of Section 8(a)(1) of the Act, I believe that the most credible and reliable accounts were those of alleged discriminatees, Rupp and Ewoldt, each of whom appeared to be testifying truthfully as to his recollection of what Atkins said and that, during his testimony, Atkins virtually admitted making at least two of the ascribed, allegedly unlawful comments. Thus, relying only on the testimony of Rupp

[35] I am concerned about the clear bias, which Shreeve exhibited, for the Union. Thus, not only had he worked with the employees, whom he supervised, for a long time, but also he had placed his name on the Union's out-of-work list prior to quitting his job with Respondent and, after trying for a number of years, had become a member of the Union after leaving Respondent. Additionally, as shall be discussed infra, I believe he fabricated his denial of an unfair labor practice, which was attributed to him. In these circumstances, I shall only credit Shreeve when corroborated by other, credible witnesses or the record as a whole.

[36] I am concerned with counsel for the General Counsel's conduct in attempting to withdraw this consolidated complaint paragraph clearly in an undisguised attempt to bolster Brent Shreeve's credibility. Thus, while he denied engaging in the alleged conduct, it is obvious that the General Counsel would not have pled the allegation without supporting evidence, and, in fact, probative evidence was presented. In my view, the General Counsel's overriding burden is to establish the truth of what occurred in any unfair labor practice matter and not merely to act as a litigating party with an interest to protect.

[37] Matovich denied making such a statement to Shreeve, and, while I generally believe that the former was a far more credible witness than Shreeve, given subsequent events, which I will discuss infra and which warrant the conclusion that Respondent acted unlawfully in attempting to dissuade employees from supporting the Union, I shall credit and rely on Shreeve's testimony as to their conversation.

[38] Shreeve testified that he believed Matovich used him as a conduit to the employees, and I believe that, in this instance and in another, Matovich deliberately communicated a threat to Shreeve certain that the latter would communicate it to the employees, whom he supervised.

and Ewoldt and the admissions of Atkins, I find that, during the mandatory employee meeting, Atkins commented, concerning whether its current employees were professional enough to work for Respondent if the Union triumphed in the election, that "once we went Union . . . there was probably people among us that I would not call out as a Union operator at the higher wage" and that Atkins also told the employees, if Respondent went Union, it would have to begin bidding on projects in other segments of the construction market and would not be as "competitive" as it had been in the residential market, probably resulting in "cutbacks" in the work force and "layoffs." In my view, Atkins admitted comment, regarding the consequences of a union election victory, was intended to convey, to each of the assembled employees, a warning that his opportunity for continued employment with Respondent would be jeopardized if the employees selected the Union as their collective-bargaining representative. Such a veiled threat of possible job loss was patently coercive and violative of Section 8(a)(1) of the Act. *Hoffman Security*, 315 NLRB 275, 278 (1984). A finding as to whether Atkins' comment, regarding Respondent's ability to remain competitive and resulting cutbacks and layoffs, appears to be governed by the Board's decision in *Harrison Steel Castings Co*., 293 NLRB 1158, 1159 (1989), a case involving an identical, although written, statement. Therein, the Board concluded:

> In a case devoid of union animus or unlawful threats, an employer might suggest as a general economic proposition the bearing that the administrative costs of collective bargaining [have] on . . . the employer's competitive position in the market. But having manifested overt hostility to the union activities in its work force . . . Respondent could not lawfully go on to suggest the loss of jobs as a result of loss of business to the competition without demonstrating to employees that such a chain of causation would be brought about through forces beyond [its] control. Without more specific, objective data, the statement in question could just as well be taken to suggest that . . . Respondent might . . . discharge employees in the event they chose to be represented by a collective-bargaining representative.

Here, Atkins accompanied his comments, regarding Respondent's inability to compete in the residential construction market as a union contractor and the possibility of cutbacks and layoffs, with his above-described unlawful threat of job loss in the event Respondent's employees selected union representation. Moreover, Atkins uttered his comment in the context of unlawful interrogations and an unlawful threat of business closure. In these circumstances, and as Atkins offered the employees no objective evidence to substantiate his linkage of inability to compete with probable job losses, his comments could be taken by the assembled employees as a threat of job loss if they voted for representation by the Union. Accordingly, Atkins comment was violative of Section 8(a)(1) of the Act. Id. I further find that, regarding negotiating with the Union, Atkins probably said "that they could drag their heels and make it go on forever" and that he admitted saying "my understanding, by law, that at least once a month we have to sit down with the Union and show good faith efforts of negotiations for at least an hour per month." In either case, there can be little doubt that Atkins intended his comment to convey to the assembled employees that voting for the Union would be a futile gesture as Respondent would never agree to a collective-bargaining agreement. Therefore, I find that Atkins' comment was clearly violative of Section 8(a)(1) of the Act. *Airtex*, 308 NLRB 1135 fn. 2 (1992).

With regard to the final alleged violation of Section 8(a)(1) of the Act, notwithstanding harboring serious doubts as to Brent Shreeve's honesty and cognizant of Bill Matovich's specific denial, based on the record as a whole,[39] I credit the testimony of Brent Shreeve and find that, just before the representation election, Matovich approached Shreeve at the Del Webb jobsite and, after asking if the employees would vote for the Union, he "proceeded to tell me that Lee Atkins offered us a dollar an hour raise and they would pay for all of our medical, dental insurance come [January 1] if we voted no on the Union" and to tell Shreeve to inform the employees of Atkins' offer. Crediting Shreeve and Todd Ewoldt, I further find that, subsequently, Shreeve informed several employees, including Ewoldt, "that the management was offering a dollar an hour raise and was wanting to pick up our benefits if the Union was voted out." Clearly, such a promise of benefits in order to dissuade employees from supporting a union is patently unlawful and violative of Section 8(a)(1) of the Act, and I so find here. *Marriott Corp.,* 310 NLRB 1152, 1157 (1993).

I turn now to consideration of the consolidated complaint allegation that Respondent's discharges of employees Robert Rupp and Robert Atteberry were each violative of Section 8(a)(1) and (3) of the Act. In this regard, as to what transpired on the morning of the day of the discharges, October 25, 1996, in appraising the respective testimony of Rupp, Brent Shreeve, and Bill Matovich, I rely on what I perceive as the more candid testimony of Matovich. While the latter's testimonial demeanor was not that of an entirely candid witness, I was less impressed with the honesty of either Rupp or Shreeve as to what transpired that day. Accordingly, I find that, as two scraper machine operators failed to report for work at Respondent's Seven Hills jobsite that morning, at approximately 7:30, Matovich telephoned Shreeve and told him he needed two men to replace the two absent operators, and Shreeve responded that, due to heavy winds, Atteberry and Rupp could not operate the screening plant that day and that, after Matovich asked if Shreeve would send them to the Seven Hills project, Shreeve said the two operators had just left and were on their way to the office to obtain their paychecks.[40] I further find that Matovich telephoned to Respondent's office and was told that Atteberry and Rupp were standing outside in the parking lot; that, at 8:20, Matovich placed to a call to Rupp's cellular telephone number and Rupp answered; that Matovich began by informing the employee that two scraper hands had not reported for work that

[39] I believe that, the record, as a whole, is corroborative of Shreeve's testimony. Thus, Respondent's acts and conduct, during the preelection period, including unlawful interrogations of employees, unlawful threats of business closure and job loss, and warning of the futility of supporting the Union, are demonstrative of an employer desperate to deny its employees an uncoerced choice during a representation election. Moreover, during the Mardi Gras Hotel meeting, employee questions established that they were concerned about a raise in pay and having to pay for their health insurance. Finally, as with the threat of plant closure, I believe that Matovich was confident that Shreeve would follow his instructions and inform the employees as to Atkins' offer.

[40] I credit Matovich that Shreeve did not specifically say he had sent Rupp and Atteberry home or had given them the day off. On the other hand, as Shreeve said the employees were on their way to the office to obtain their paychecks, I believe Matovich understood that the two had been given the day off.

morning at Seven Hills, by asking if Rupp and Atteberry could come out and operate the scrapers and by adding that Respondent was on a "deadline" and he needed the employees; that Rupp responded "they had other plans"; that Matovich asked that they "please come help [him] as he needed them bad"; that Rupp said he would speak to Atteberry and, after approximately 10 seconds, came back on the line, saying "we can't do it" and "we have other plans"; that Matovich once again said he needed the two employees to work that day, and Rupp again declined; and that, finally, Matovich said "fine, if that's the way you feel, I'll get someone else."[41] Also, I find that, after Respondent decided to discharge the two employees, Matovich met Shreeve at the Pulte Hills jobsite and informed him that Rupp and Atteberry had been discharged for "refusing to run scrapers" on the Seven Hills job.[42]

In determining whether Respondent acted unlawfully by discharging employees, Rupp and Atteberry, I must utilize the analytical framework, set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Thus, in order to prove a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel has the burden of establishing that the alleged discriminatees engaged in union activities; that Respondent had knowledge of such conduct; that Respondent's actions were motivated by union animus; and that the discharges and layoffs had the effect of encouraging or discouraging membership in the Union. *WMRU-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the foregoing matters by a preponderance of the evidence. *Gonic Mfg. Co*., 141 NLRB 201, 209 (1963). However, while the above analysis is easily applied in cases in which a respondent's motivation is straightforward, conceptual problems arise in cases in which the record evidence discloses the presence of both a lawful and an unlawful cause for the allegedly unlawful conduct. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established a causation test in all 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089. Three points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not "quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act." Id. at 1089 fn. 4. Second, once the burden has shifted to the employer, the crucial inquiry is not whether Respondent could have engaged in the discharges and layoffs here, but, rather, whether Respondent would have done so in the absence of the alleged discriminatees' union activities and support. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene's Department Stores*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (*Wright Line*, supra at 1084 at fn. 5) and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.*, 291 NLRB 39 (1989). As to the latter point, "it is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances . . . warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Flour Daniel, Inc.*, 304 NLRB 970 at 970 (1991); *Shattuck Den Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966).

In accord with the above-described legal principles, I believe that Respondent's terminations of its employees, Atteberry and Rupp, were violative of Section 8(a)(1) and (3) of the Act. At the outset, the record evidence establishes that Atteberry engaged in significant union activities, having been the main organizer for the Union amongst Respondent's employees and the labor organization's observer during the representation election, and that Rupp aided Atteberry in his efforts during the campaign. The record evidence also establishes that, while it probably was not aware of Atteberry's or of Rupp's support for the Union during the preelection period, Respondent obviously was aware that the former acted as the Union's election observer. Moreover, I believe that there is a surfeit of record evidence revealing Respondent's animus against its employees' support for the Union. Thus, I have previously concluded that Respondent engaged in interrogation of employees in an effort to gauge the extent of support for the Union amongst its employees and that Respondent threatened employees with closure of the facility, loss of jobs, cutbacks in the workforce, and layoffs, and I believe that it engaged in the unlawful acts and conduct in order to dissuade it employees from supporting the Union.

Further demonstrative of Respondent's unlawful animus is the pretextual and sham nature of its defenses to the allegations involving Rupp and Atteberry. Bluntly put, while Matovich did, in fact, ask them to accept and the two employees, did, in fact, refuse work assignments on October 25, the respective internally and externally inconsistent testimony of Matovich, Prlina, and Atkins and the record, as a whole, convince me that the proffered explanation for their discharges was not the veritable reason for the discharges—in reality, a canard. Initially, with regard to the decision-making process itself, Matovich was internally inconsistent, first testifying that, during his asserted telephone conversation with Prlina occurring shortly after he spoke to Rupp, Prlina told him to "do what you want to" and that, subsequently, he telephoned the company secretary and instructed her to terminate Atteberry and Rupp and later changing his testimony and stating that "[Prlina] said do you want me to go ahead and terminate them then" and that, rather than him, it was Prlina, who arranged for the terminations.[43] Also, Prlina and Atkins contradicted each other as to the latter's involvement in the discharges. Thus, while Atkins denied having any role in the discharge decision, conceding only that "I agreed with [it]" and that "they just told me what they were doing and asked if I had a problem with it," Prlina testified that Atkins was directly involved—"we determined that we should terminate Robert Rupp and Robert Atteberry . . . ." Next, regarding

[41] I have carefully examined the three record versions of this telephone conversation and do not find them to be inconsistent. Moreover, I believe the entire conversation could have occurred within 66 seconds, the length of the conversation according to the telephone billing records.

[42] Matovich failed to deny this conversation, and, I believe, he intentionally made this statement to Shreeve.

[43] I note that Matovich and Prlina also contradicted each other as to whether the Union was mentioned during their asserted telephone conversation.

Respondent's asserted practice concerning employees who refuse a work assignment, while Matovich initially insisted that Respondent's policy is to terminate any employee who refuses a work assignment and denied any practice of permitting employees to do so, he subsequently changed his testimony in the latter regard, conceding that, depending on the circumstances, he might permit a work refusal to "slide."[44] Prlina contradicted Matovich on this point, denying that Respondent would ever permit such employee misconduct to slide. Finally, notwithstanding what Matovich said to Rupp during their telephone conversation, the record fails to support Respondent's contention that it had an urgent need for them operate scraper machines at the Seven Hills project on October 25. Thus, Respondent's own records reveal that neither of the two scraper machines was operated on Saturday, October 26, and Matovich admitted the reason was that Respondent was sufficiently current with scraper work to the point that there was no necessity to operate the two machines on Saturday. Further, the scraper machines were operated on a normal schedule on Monday, October 28, and no overtime was worked on the following Saturday, a normal catchup day. In the foregoing circumstances, and based on the record as a whole, I am convinced that, when Rupp informed Matovich that he and Atteberry declined Matovich's requests that they report to the Seven Hills jobsite in order to operate the two down scraper machines,[45] Respondent seized on the opportunity to rid itself of two employees, one, who, the previous day, had revealed himself as a probable ringleader of the Union's organizing effort, and, to disguise its true intent,[46] another, who, in counsel for the Union's apt words, was in the wrong place at the wrong time.[47] Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees, Robert Atteberry and Robert Rupp.

[44] Matovich stated that, given numerous refusals to perform assignments on the Seven Hills project, he could not let Rupp's and Atteberry's misconduct slide. As he offered no corroboration for this assertion, I do not credit Matovich in this regard. Moreover, given Matovich's concession that, during his 7:30 a.m. telephone conversation with Shreeve, he understood the latter as meaning that he had given the two alleged discriminatees the remainder of the day off, it is reasonable to conclude that, but for the Union and rather than warranting discipline, this was the type of instance in which Matovich normally would have permitted an employee's refusal to perform an assignment to "slide."

[45] I shall not speculate as to why, during their telephone conversation, Matovich insisted to Rupp that he required their services at the Seven Hills jobsite. Whatever Matovich's motivation, it is clear that Respondent's need for their services was not urgent.

[46] I agree with counsel for the General Counsel and counsel for the Union that the real object of Respondent's unlawful animus was Robert Atteberry and find merit in the General Counsel's theory regarding Respondent's reason for terminating Robert Rupp. Where, as here, the existence of union animus is palpable and where the explanation given for both discharges is not credible, the fact that another employee, in addition to the employee, who, the respondent believes, was the main union adherent amongst the employees, is the object of the respondent's retaliation does not preclude a finding of discriminatory intent. *Consumers Asphalt Co.,* 295 NLRB 749, 752 at fn. 14 (1989); *Alliance Rubber Co.,* 286 NLRB 645, 647 (1987).

[47] Inasmuch as Matovich understood that such would be more credible coming from Shreeve, I believe the reason that Matovich fabricated the reason for the discharges to Shreeve was his expectation that Shreeve would, in turn, relate this disingenuous explanation to the alleged discriminatees and to Respondent's other employees.

Robin Transportation, 310 NLRB 411, 418 (1993); *San Lorenzo Lumber Co.*, 238 NLRB 1421 (1978).

Turning to the consolidated complaint allegation that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee, Todd Ewoldt, I again utilize the guidelines, which were set forth by the Board in *Wright Line*, supra. Therefore, the General Counsel's initial burden was to establish a prima facie showing that Respondent was unlawfully motivated in terminating Ewoldt, and, in this regard, I believe that counsel for the General Counsel have failed to meet their evidentiary burden of proof. Thus, inasmuch as there is scant record evidence of what, if any, activities in support of the Union Ewoldt may have engaged and as there is no evidence that Respondent had any knowledge of, or even suspected, Ewoldt's support for the Union, counsel rely on the testimony of Brent Shreeve, concerning an alleged conversation with Matovich the day after the latter's unlawful interrogation of the employee,[48] and the asserted pretextual nature of Respondent's defense to the alleged unlawful discharge as establishing the required prima facie showing of a violation of the Act. As to the former, I am unable to credit Shreeve's assertion that Matovich told him he was going to fire Ewoldt if the employees selected the Union as their bargaining representative. Thus, I believe that Shreeve exhibited a clear bias in favor of the Union, and, as between Matovich and Shreeve, I found the former to have been the more credible witness. Moreover, for the identical reason I believe Matovich gave Shreeve a false explanation for his terminations of Atteberry and Rupp, I do not believe that, while speaking to Shreeve, Matovich ever would have mentioned the Union in explaining why Respondent believed it necessary to terminate Ewoldt, who, Matovich knew, was a friend of Shreeve's. In these circumstances, the General Counsel has failed to prove that Respondent knew or suspected that Ewoldt was a supporter of the Union,[49] and, as employer knowledge is one of the elements required for establishing a prima facie showing of discriminatory motivation, it, therefore, has failed to prove a violation of Section 8(a)(1) and (3) of the Act. *International Carolina Glass Corp.,* 319 NLRB 171, 174 (1995); *Dorey Electric Co.,* 312 NLRB 150, 151–152 (1993). As to the pretextual nature of Respondent's defense, while there is record evidence that Respondent selected the alleged discriminatee for layoff and retained less senior employees and belatedly raised his attendance record as a reason for his selection for layoff, in the absence of proof of knowledge, "proof of suspicious circumstances is not enough." *Dorey Electric Co.,* supra at 151. In these circumstances, I shall recommend dismissal of the consolidated complaint allegation pertaining to the discharge of Todd Ewoldt.

Finally, in examining the consolidated complaint allegation that Respondent acted in violation of Section 8(a)(1) and (5) of the Act by laying off employees Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor,

[48] Presumably, counsel for the General Counsel would seek that I infer both suspicion of support for the Union and animus from what Matovich assertedly said. The latter, of course, specifically denied what was attributed to him by Shreeve.

[49] I realize that, while uncorroborated by Shreeve, alleged discriminatee Ewoldt testified that the former reported to him what Matovich assertedly said; however, the issue is not what Shreeve may have said to Ewoldt but, rather, what Matovich allegedly said to Shreeve. Accordingly, the credibility of Ewoldt is not at issue, and it is enough that I do not believe that Shreeve's testimony on this point.

I note that much of what occurred is not in dispute. Thus, I find that the Union was certified as the collective-bargaining representative of Respondent's operating engineer employees on November 4, 1996; that Hickman, Billsby, Mathers, Kennedy, and McPhie were laid off in December 1996 and Taylor was laid off in January 1997; and that, as Respondent concedes, it laid off each employee without prior notification to the Union and without affording it an opportunity to bargain over the decisions to lay off each and the effects of each layoff. Further, relying on the uncontroverted testimony of James Guin, I find that the Union did not become aware of the foregoing layoffs until after the commencement of bargaining for the parties' initial collective-bargaining agreement when the Union's agent, James Guin, compared a list of current employees with those listed on the election eligibility list. Citing *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), counsel for the General Counsel and counsel for the Union argue that what occurred herein was an economically motivated decision to lay off employees; that such a decision constitutes a mandatory subject of bargaining; and that, therefore, Respondent was obligated to have provided notice and to have afforded the Union an opportunity to bargain concerning the decisions to lay off employees and the effects of those decisions. Taking a contrary view, counsel for Respondent argue that Respondent was not obligated to have afforded the Union an opportunity to bargain herein as the lay offs the above six individuals resulted from Respondent's entrepreneurial decision to change the scope and direction of its southern Nevada work from residential to public works and commercial construction projects and that its conduct should be analyzed pursuant to the guidelines set forth by the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and by the Board in *Dubuque Packing Co.*, 303 NLRB 386 (1991).

There is no doubt as to which is the proper analytical approach. Thus, while in *Lapeer Foundry*, supra, the Board did conclude that economically motivated decisions to lay off employees are mandatory subjects of bargaining, its decision therein was based on the legal analysis set forth in *Otis Elevator Co.*, 269 NLRB 891 (1984), which was overruled by the Board in *Dubuque Packing Co.*, supra, and the Board disavowed use of *Lapeer Foundry* itself as legal precedent in *Holmes & Narver*, 309 NLRB 146, 147 at fn. 3 (1992). Therefore, *Lapeer Foundry* may not be relied on as supporting the General Counsel's position here. In agreement with counsel for Respondent, I believe that, as to whether, prior to laying off the above six employees, Respondent was under a mandatory obligation to have given prior notice to and to have afforded the Union an opportunity to bargain regarding the layoff decisions, *First National Maintenance Corp.* is controlling. Therein, the issue, before the Supreme Court, was whether an employer's decision to close part of its business was a mandatory subject of bargaining, and, in its decision the Court set forth several relevant principles. Thus, noting that Section 8(a)(5) of the Act mandates bargaining only on matters "that settle an aspect of the relationship between the employer and the employees," the Court described three categories of employer decisions, which affect employees. "Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. . . . Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee. The . . . third type of management decision, one that ha[s] a direct impact on employment . . . . involv[es] a change in the scope and direction of the enterprise" and "is akin to the decision whether to be in business at all" but is '"not primarily about conditions of employment though the effect of the decision may be necessarily to terminate employment.'" Id. at 676–677. According to the Supreme Court, this third type of management decision constitutes a mandatory subject of bargaining "only if the benefit, for labor management-relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." Id. at 679. In this regard, the Court noted that, "if labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable." Id. at 682.[50]

With regard to the layoffs at issue here, based on the testimony of Takefumi Takuma, I find that, commencing in August or September 1996, as part of a corporatewide restructuring and in order to ascertain the reasons for the profitability or lack thereof of its existing construction projects in the southern Nevada area, Respondent placed a moratorium on bidding for new jobs by its Las Vegas office; that, as a result, during the fall of 1996, Respondent's only work in this area consisted of completing its existing jobs; and that, as each project neared completion, no positions were available to which employees could be transferred. Further, specifically concerning the six employees at issue, Takuma admitted, and I find, that "the direct reason for [their] layoffs was lack of work." Moreover, the instant layoffs occurred in December 1996 and January 1997, and, while Takuma testified that, concurrent with Respondent's review of its existing Las Vegas construction projects during the fall of 1996, it began calculating the types of projects for which it would bid in the future, he further admitted, and I further find, that the actual decision to change its market concentration from the residential to the public works and commercial construction markets was not reached until "beginning probably February . . . . 1997"—several weeks after the instant layoffs occurred. In these circumstances,[51] as Respondent's layoff

[50] In analyzing whether a duty to bargain exists in the third category of managerial decisions, the Board, in *Dubuque Packing Co.,* supra, which involved a decision to relocate a plant, adopted a multipart balancing test, which, counsel for Respondent contend, should be applied herein. Pursuant to said test, the General Counsel has the burden of establishing that Respondent's decision is unaccompanied by a change in the basic nature of the employer's operations. If such is established, the burden shifts to the employer to establish that, in fact, there has been a change in the scope of its operations or that direct or indirect labor costs were not a factor in its decision or, if a factor, that the union could not have offered concessions sufficient to change the employer's decision.

[51] I agree with counsel for the General Counsel and counsel for the Union that Respondent has failed to prove that its change from bidding on residential construction work to bidding on public works and commercial construction projects constituted a change in the scope and direction of its work. Thus, notwithstanding different job markets, there is no record evidence that the nature of Respondent's heavy construction work would change. Takuma was extremely candid on this point, admitting that the new jobs, for which Respondent was bidding, required the same types of equipment operators and use of the same types of equipment, which Respondent utilized on residential construction work—bulldozers, scrapers, and water pull trucks. Moreover, Takuma continually admitted that the shift in construction markets was

decisions appear to have been directly related to the availability of work and predated its decision to change its job markets, rather than falling within the *First National Maintenance Corp.* third category of entrepreneurial management decisions aimed at changing the scope and direction of the enterprise, they are more akin to the *First National Maintenance Corp.* second category of management decisions, such as the order of succession for layoffs and recalls, production quotas, and work rules, which are "almost exclusively 'an aspect of the relationship' between employer and employee" and are mandatory subjects of bargaining. Therefore, as it is unnecessary to engage in the *Dubuque Packing Co*., supra, type of multistep analysis regarding subjects falling within this category, I find that the lack of available work layoff decisions here constituted mandatory subjects of bargaining. *Winchell Co.*, 315 NLRB 526 at fn. 2 (1994); *Westinghouse Electric Corp.*, 313 NLRB 452, 453 (1993); *Holmes & Narver*, supra at 147. Accordingly, I conclude that Respondent unlawfully implemented its layoffs of the six named employees without affording the Union adequate notice and an opportunity to bargain about its decisions and that, by failing to do so, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

While conceding that Respondent was also obligated to have engaged in bargaining with the Union over the effects of the layoffs of its six employees, counsel for Respondent argue that such, in fact, occurred and that, therefore, the Union is precluded from seeking a remedy here. Initially, there is no dispute that, prior to the any of the six layoffs, Respondent failed to afford the Union an opportunity to bargain over the effects of each. In *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 (1994), an employer failed to afford a union notice of layoffs until after the layoffs had been effectuated. In affirming the administrative law judge's finding that the obligation to afford a union an opportunity to bargain over the effects requires such bargaining before the decision is implemented, the Board held that the respondents "were obligated to provide the Union with preimplementation notice of the decision to close the [facility] to satisfy an employer's effects-bargaining obligation . . . ." Id at 1022 at fn. 8. The Board reached an identical result in *Chrissy Sportswear*, 304 NLRB 988, 989 fn. 6 (1991), holding that "preimplementation notice" is required to satisfy an employer's effects bargaining obligation. Here, there can be no doubt that Respondent's failure to afford the Union an opportunity to bargain over the effects of the layoffs of the six employees prior to implementation of each layoff was patently violative of Section 8(a)(1) and (5) of the Act, and I so find.

Notwithstanding Respondent's failure to permit the Union to engage in effects bargaining prior to each of the layoffs, counsel for Respondent argue that their client's effects bargaining obligation was satisfied during the parties' subsequent initial contract bargaining and that no remedy should be ordered. As to what occurred during the said bargaining, as, between Lee Atkins and Mickey Adams, I was more impressed with the demeanor of the latter while testifying and believe he testified in a more forthright manner than did Atkins, I rely on Adams' version of what occurred. Therefore, I find that, while the general subject of layoffs may have arisen during the bargaining, the specific layoffs of the six employees, named in the consolidated complaint, were never discussed during the bargaining. On this point, while, as a result of bargaining, a list of employees, including the names of the six individuals at issue, whom Respondent agreed to reemploy when work became available, was attached to the parties' collective-bargaining agreement, contrary to Respondent's counsel, I do not view this as satisfying Respondent's effects bargaining obligation herein. Further, effects bargaining is most effective prior to implementation of an employer's action, a time when the union retains some bargaining leverage. Once the act becomes a fait accompli, as herein, a union is relegated to the status of a supplicant, a position incompatible with the purposes and policies of the Act. In these circumstances, especially noting that no specific discussion regarding the six employees occurred during the bargaining, I reject counsel for Respondent's contention and find that their client's obligation to bargain over the effects of the layoffs remained unfulfilled during the subsequent contract negotiations.

directly related to increased labor costs, caused by Respondent's status as a union signatory contractor, and such, is, of course, directly amenable to collective bargaining.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since November 4, 1996, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees, who perform the work traditionally performed by members of the Union, including, but not limited to, equipment operators, mechanical and maintenance personnel, surveyors, and grade checkers, in Counties of Clark, Lincoln, Nye, and Emeralda in Southern Nevada; excluding all other employees, truckdrivers, employees covered by other labor agreements, office clerical employees, professional employees, guards, and supervisors as defined in the Act, for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. By interrogating its employees regarding their union sympathies and the Union sympathies of their fellow employees, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

5. By threatening its employees with closure of Respondent's Las Vegas operations if they selected the Union as their bargaining representative, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

6. By threatening its employees with loss of their jobs if they selected the Union as their bargaining representative, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

7. By threatening its employees that Respondent would be less competitive, resulting in probable cutbacks and layoffs, in the residential construction market if they selected the Union as their bargaining representative, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

8. By informing its employees that it would drag its heels and prolong negotiations forever and that it was, by law, only required to bargain with the Union once a month for an hour, Respondent threatened employees with the futility of selecting the Union as their bargaining representative, thereby engaging in conduct violative of Section 8(a)(1) of the Act.

9. By promising its employees a wage increase and fully paid medical and dental insurance if they voted against the Union as their bargaining representative, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

10. By discharging its employee, Robert Atteberry, because it believed he had been a leading proponent of the Union amongst its employees and by discharging its employee, Robert Rupp, in order to disguise its actual reason for discharging Atteberry, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

11. By laying off its employees, Robert Hickman, Dan Billsby, Jim Mathers, Guy Kennedy, Justin McPhie, and Bucky Taylor due to lack of work without giving prior notice of each layoff to the Union and affording the Union a prior opportunity to bargain regarding each layoff decision and the effects of each layoff, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

12. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondent has committed no violations of the Act unless expressly found here.

REMEDY

Having found that Respondent has engaged in serious unfair labor practices violative of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions necessary to effectuate the purposes and policies of the Act.

Having concluded that Respondent violated Section 8(a)(1) and (3) of the Act by terminating its employees, Atteberry and Rupp, on October 25, 1996, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former positions of employment, without prejudice to their seniority or other rights and privileges and that it make them whole for any loss of earnings and benefits lost as a result of the discrimination practiced against them, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, having concluded that Respondent violated Section 8(a)(1) and (5) of the Act by laying off its employees, Hickman, Billsby, Mathers, Kennedy, McPhie, and Taylor, I shall recommend that it be ordered, on request, to bargain with the Union with regard to each layoff decision and the effects of each layoff. I shall also recommend that Respondent be ordered to offer to each of the six employees immediate and full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position and to make whole each employee for any loss of earnings and other benefits suffered as a result of its unlawful unilateral action. Backpay shall be calculated in the manner set forth in *F. W. Woolworth Co.,* supra, with interest to be computed in the manner set forth in *New Horizons for the Retarded,* supra.

[Recommended Order omitted from publication.]